Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In South Carolina, a criminal defendant's evidence of third-party guilt is inadmissible if, when comparing this evidence standing alone against the prosecution's evidence, the trial court finds that it fails to create a reasonable inference of innocence. In making this comparison, if the trial court finds the prosecution's evidence – and especially its forensic evidence – to be "strong," third-party guilt evidence is per se inadmissible because it is deemed, as a matter of law, to be insufficient to "overcome" the prosecution's evidence so as to create a reasonable inference of innocence.

1. Whether South Carolina's rule governing the admissibility of third-party guilt evidence violates a criminal defendant's constitutional right to present a complete defense grounded in the Due Process, Confrontation, and Compulsory Process Clauses?

2. Whether a capital defendant is denied due process when a prosecutor successfully moves for the exclusion of third-party guilt evidence and then, in closing argument, urges the jury to find the defendant guilty because of the absence of such evidence?

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JURISDICTION

The South Carolina Supreme Court's judgment was entered on November 1, 2004. A timely petition for rehearing was denied on December 1, 2004 (Pet. App. 25a). On February 17, 2005, this Court granted Petitioner an extension until March 31, 2005 to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV.

The Sixth Amendment of the Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

STATEMENT OF THE CASE

A. The Assault and the Victim's Description of Her Assailant

On December 31, 1989 between 6:00 and 7:00 a.m., eighty-six year old Mary Stewart was beaten, raped, and robbed in her York, South Carolina home. After the assailant left, Ms. Stewart called her friend Maggie Thrasher and reported that she had been assaulted by "a dark chunky fellow," "kind of short [and] dark skinned." (Tr. 2148, 2150.) Ms. Thrasher contacted Alaine Byers, another friend of Ms. Stewart's, who had a car and a key to her house. (Tr. 2153-54.) Ms. Byers reached Ms. Stewart's apartment around 8:00

a.m. and found her in her bedroom. (Tr. 2163-65.) When Ms. Byers asked who had attacked her, Ms. Stewart replied, "I don't know who he was. All I know is he was big and dark." (Tr. 2167.)

After being contacted by Ms. Byers, three officers from the York City Police Department responded to the crime scene, arriving around 8:15 a.m. (Tr. 2326.) As the police began collecting evidence, Ms. Stewart was taken to the hospital where she described her assailant to ER nurse Carol Cole as in his "late twenties." (Tr. 2235.) Sometime in the late morning or early afternoon, with her mental state deteriorating, Ms. Stewart also gave Lieutenant Wilson Barnett a taped statement. (Tr. 2329, 2260-61.) She told Barnett that her assailant was wearing a blue or black sweatshirt, but that she could not see well without her glasses. (Tr. 2357.) Ms. Stewart further described her assailant as "middle-aged, he was young, he was not too young, and he as I remember his hair was not short and not too long . . . [his hair was] kind of long, not too long but a little longer than you [Lieutenant Barnett] usually wear it." (Tr. 2346, 2350, 2352.)

This was the last description Ms. Stewart gave. During the attack she suffered a massive brain trauma that eventually debilitated her and ultimately caused a fatal pneumonia. (Tr. 3614.)

B. Petitioner Becomes the Prime Suspect Although No Evidence Links Him to the Crime

Several hours before the attack on Ms. Stewart, York Police Officer Grady Harper was dispatched to break up a disturbance at the Cannon Court Apartments, which are located several blocks from Ms. Stewart's home. (Tr. 2394, 2834-35.) Harper found Petitioner Holmes and another man in an argument, surrounded by onlookers. (Tr. 2395-96, 2427, 3664, 3680.) Harper asked the group to disperse, and most did, but Petitioner chose instead to taunt Harper with what Harper described as "a few choice words." (Tr. 2395-2403, 2406-07.) Harper then called for back up, intending to arrest

Petitioner. (Tr. 2397.) As soon as additional officers arrived, Petitioner ran. (Tr. 2398, 2427-29, 3665.) After hiding behind a brick wall, he managed to flag down and jump into a friend's car. (Tr. 2401, 3665-67.) Within minutes, however, Harper caught sight of Petitioner and initiated a traffic stop of the car in which he was riding. (Tr. 2401, 2430, 3667-68.) Once again, Petitioner ran, this time eluding both Harper and a second set of officers called to join the chase. (Tr. 2403, 2421, 3668.) The police last reported seeing Petitioner at 5:20 a.m. (roughly an hour before Ms. Stewart's assault), running in the opposite direction of Ms. Stewart's apartment. (Tr. 2409, 2422.)

By 11:30 a.m., the police identified Petitioner, the late-night troublemaker who had gotten away, as their prime suspect in the attack on Ms. Stewart. (Tr. 2497.) At this time, however, the police had no physical evidence linking Petitioner to the crime, no witnesses placing Petitioner near Ms. Stewart's apartment at any time, much less near the time of the assault. (Indeed, no such witness ever emerged). To the contrary, the police had a physical description (middle-aged with longish hair) that did not match Petitioner, and had also received information from one of Ms. Stewart's neighbors (Delores Brown) that a man named Jimmy White (who fit the description better and had a history of violence, including against an older woman) had been on Ms. Stewart's street around the time of the assault. (Third-Party Guilt Hr'g, Aug. 15, 2001, Tr. 6-7, 26.)

C. The Police Evidence Collection and Petitioner's Arrest

On arriving at Ms. Stewart's apartment, the police began their investigation. Officer Dale Edwards collected Ms. Stewart's nightgown, robe, and slippers from the bathroom floor (where Ms. Stewart had dropped them) and placed all of them inside a single paper bag obtained from Ms. Stewart's kitchen. (Tr. 2201, 2215, 2338.) Edwards assisted Lieutenant Barnett in folding the bed sheets, each man holding the four corners extended, and together folding the sheets into halves. (Tr. 2184, 2334-35.) They placed the sheets and pillow cases together in another paper bag from

Ms. Stewart's kitchen. Edwards also retrieved from Ms. Stewart a paper towel that she said had evidence on it. (Tr. 2186.) During this evidence retrieval and collection, neither Edwards nor Barnett wore gloves. (Tr. 2215, 2334.)

Outside the apartment, another officer ran a bloodhound around the perimeter of the Housing Authority apartments. (Tr. 2376-77.) The search yielded a man's tank top on a beaten path leading from the apartments to a street circling the parking lot for the housing complex. (Tr. 2377, 2383.) Although the police sent this evidence to the State Law Enforcement Division ("SLED") for forensic analysis, it was never tested for DNA. (Tr. 3169-70, 3182.)

Around 8:45 a.m., Captain William Mobley arrived to take charge of the investigation. (Tr. 2755.) After locking the door to Ms. Stewart's apartment, he decided to process the crime scene by himself. (Tr. 2482.) In addition to taking photographs, Mobley dusted for fingerprints, including the telephone and pocketbook that Ms. Stewart said the assailant had touched. On these, Mobley purportedly found only smudges. (Tr. 2340, 2485, 2487-88, 2495.) Indeed, at trial, Mobley would claim that in the entire apartment he found just two usable prints. (Tr. 2488, 2493.) The first was a partial palm print that he claimed to have lifted from the interior of Ms. Stewart's door. The second print was purportedly taken from the exterior of the door. (Tr. 2493.) Mobley also discovered a footprint, though he omitted it from his diagram of the crime scene. (Tr. 2737, 2748.)

At 2:00 p.m. Mobley and Officer James "Boot" Smith drove to the hospital where Ms. Stewart was initially admitted to pick up the rape kit containing vials of her blood. (Tr. 2240, 2530.) The rape kit, however, was both incomplete and compromised. Because of Ms. Stewart's condition, the nurse did not perform a pelvic exam; nor did she take fingernail scrapings. (Tr. 2236, 2244-45.) Most important, the vacutainers she used to collect Ms. Stewart's blood had long since passed their expiration date (Tr. 2250), thus rendering the blood useless for DNA testing. (Tr. 3446-47, 3616-17, 3783.) Later, law enforcement allegedly lost a second, more complete rape kit altogether. (Tr. 2282-85; 3763.)

With the victim's blood in hand, Mobley and Smith decided next to go to the Petitioner's apartment, having designated him as the prime suspect despite an absence of any supporting evidence. After finding Petitioner in his bedroom wearing a black-hooded sweatshirt and a pair of briefs, the officers arrested him, not for the assault on Ms. Stewart, but for a completely unrelated theft, and also seized certain clothing items. (Tr. 2498, 2511-13.) Petitioner was charged for the Stewart crimes nearly two months after his arrest. Indictment for Criminal Sexual Conduct, Feb. 26, 1990; Indictment for Robbery, Feb. 26, 1990; Indictment for Burglary, Feb. 26, 1990; Indictment for Murder, Apr. 9, 1990 (following Ms. Stewart's death).

D. The Prosecution Case and Petitioner's Defense

In the absence of any eyewitness testimony linking Petitioner to the attack on Ms. Stewart, the State based its prosecution almost entirely on "forensic" evidence. Specifically, the State argued that the following evidence tied Petitioner to the crime: (1) a mixture of DNA taken from Petitioner's underwear from which the Petitioner and the victim allegedly could not be excluded as donors; (2) a mixture of DNA taken from Petitioner's shirt allegedly containing a mixture of Petitioner's and the victim's blood (Pet. App. 6a); (3) a mixture of DNA taken from a paper towel found in Ms. Stewart's home from which the Petitioner and the victim allegedly could not be excluded as donors (Tr. 3529, 3823); (4) three sets of allegedly "consistent" but common fibers found on Ms. Stewart's and Petitioner's clothing; (5) Petitioner's palm print allegedly found on the interior of Ms. Stewart's door, (Pet. App. 5a); and (6) money found in Petitioner's wallet coinciding with an amount ($40) allegedly taken from Ms. Stewart, (Tr. 2153, 2521).

At his re-trial,[1] Petitioner, who had maintained his innocence from the outset, prepared a two-pronged defense.

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1. Petitioner's first trial took place in April 1993. *See State v. Holmes*, 464 S.E.2d 334 (S.C. 1995). He was convicted on all counts. *Id.* In January

(Cont'd)

First, he intended to attack his prosecution as a rush to judgment, the result of a sloppy investigation that failed to pursue leads such as the tank top found near the scene, the footprint found at the scene, and substantial evidence that the crime was actually committed by Jimmy White. Second, Petitioner planned to attack the prosecution's "forensic" evidence. Specifically, he intended to show that the blunders in the collection of evidence compromised the testing; that in any event the forensic test results were inconclusive; and, furthermore, that, regardless of the test results, the blood evidence yielding the DNA results in the case had been planted by Captain Mobley.

As central to this appeal, Petitioner informed the prosecution and the trial court that the defense intended to present evidence that Jimmy White actually committed the crime. Multiple witnesses placed White near the scene of the crime and heard him confess to the crime. In its totality, the third-party guilt evidence that Petitioner proffered during pre-trial hearings provided comprehensive support for Petitioner's actual innocence defense by casting doubt on both the State's investigation of the crime and the reliability of the forensic test results.

In particular, Petitioner offered four proximity witnesses, including at least one whom the police had interviewed on the day of the crime, all of whom placed White in Ms. Stewart's neighborhood on the morning of the assault. (Pet. App. at 7a-8a.) Two of the proximity witnesses also saw White headed in the direction of Ms. Stewart's home near the time of the assault. *Id.*

Next, Petitioner offered the testimony of four independent and mutually corroborating witnesses who heard White confess to assaulting Ms. Stewart. *Id.* at 8a-10a. In White's

(Cont'd)

1998, Petitioner's conviction was reversed in state post-conviction proceedings due to the trial court's failure to secure a valid waiver of Petitioner's right to make a closing argument and trial counsel's failure to advise him that he could decide whether to exercise or waive that right. *Holmes v. Moore*, 96-CP-46-966, Order (Jan. 15, 1998).

confession to one of these witnesses, Ken Rhodes, White demonstrated specific knowledge of the assault on Ms. Stewart, revealing that Ms. Stewart was alive when he left the apartment after he had sex with her. *Id.* at 8a; Third-Party Guilt Hr'g, Aug. 21, 2000, Tr. 89. In White's confession to Stephen Westbrook, White stated that Smith (one of the arresting officers) had warned White to remain silent about his role in the assault because Smith wanted to convict Petitioner for the crime. (Pet. App. 9a.) Westbrook also testified that the solicitor's office told him that they manufactured evidence against Petitioner and asked Westbrook to testify falsely that Petitioner confessed to the assault. *Id.* Furthermore, White informed a fifth witness, the former receptionist at the York County Public Defender's Office, that he did not believe Petitioner was guilty and that everyone on the street knew who had committed the crime. *Id.* at 10a.

In addition to these proximity and confession witnesses, Petitioner offered evidence that White had a motive to assault Ms. Stewart and had given the police a false alibi. To establish White's motive, Petitioner offered evidence that White had a penchant for older women and was prone to violent relationships.[2] With respect to the alibi, White admitted to the police that he had been near Ms. Stewart's neighborhood shortly before the assault, but claimed by the time of the assault that he was at his home in Sharon, South Carolina, having been driven there by Joshua Lytle. *Id.* Lytle, however, told the police (and later testified at the pre-trial hearing) that he did not drive White home. *Id.* at 21a.

2. The evidence included the following: (1) Ken Rhodes' testimony that White told him he liked older women; (2) the affidavit of Carrie Simpson, an older woman, stating that White made sexual advances toward her and hit her when she rejected the advances; and (3) a psychological evaluation of White concluding that he had problems in relationships with women to which he might respond violently and that he had sexual fantasies of dominance causing him to behave inappropriately. (Third-Party Guilt Hr'g, Aug. 21, 2000, Tr. 90; Ex. 14 Def.'s July 30, 2000 Br.; Ex. 13 Def.'s July 30, 2000 Br.).

Furthermore, White's own testimony at the pre-trial hearing denying involvement in the crime included numerous instances of taunting from which a juror might have inferred actual involvement (*i.e.* "Man, if I would have did something like that, I wouldn't tell it.") (Third-Party Guilt Hr'g, Aug. 14, 2001, Tr. 305.)[3] Finally, White—a twenty-two year old African American with hair longer than Petitioner—more closely matched Ms. Stewart's physical description of her assailant than did Petitioner at the time the crime was committed.[4]

E. The Trial Court Excludes All Petitioner's Third-Party Guilt Evidence

The trial court found that Petitioner's proximity witnesses created an evidentiary basis from which a jury could conclude that White was in the right place at the right time to have committed the crime. (Pet. App. at 20a-21a.) It also found Lytle's testimony to be a credible rebuttal to White's purported alibi. *Id.* The trial court further found that four separate witnesses provided testimony from which a jury could conclude that White confessed to beating and raping Ms. Stewart. *Id.* at 21a. Although the court found the evidence of White's penchant for older women "marginal," it still deemed it probative of the issue of White's motive to commit the assault. *Id.*[5]

Nonetheless, the trial court excluded all Petitioner's proffered third-party guilt and police framing evidence. It ruled that the most telling evidence—the testimony as to

3. Testifying regarding his whereabouts that night, White stated: "[I]f I was anywhere over that way, like I said, I be drunk and, like, if I would have been there ... they'd have got me right then and there, you know ... drunk as I be ... How did I get away? You tell me that." Third-Party Guilt Hr'g, Aug. 14, 2000, Tr. 304.

4. Petitioner's hair was very closely cut in his mug-shot taken on January 1, 1990. (Tr. 2777-78.) In contrast, a mug-shot of Jimmy White taken on January 31, 1990 shows White with longer hair. (Pet. App. at 7a.)

5. Later, during the trial, the judge candidly stated that the confessions continued to "bother" him because they "rise to the level of raising some question" about Petitioner's guilt. (Tr. 2024.)

White's multiple confessions—was inadmissible hearsay. (Pet. App. 22a.) Without the confession evidence, the court continued, the remaining evidence was insufficient to establish "facts or circumstances which clearly point to Mr. White ... as the person guilty of the beating and rape of Mary Stewart." *Id.* at 23a-24a. Absent such a showing, the court concluded, the evidence did not meet South Carolina's standard for admitting evidence of third-party guilt. *Id.* at 24a.

During trial, the court also precluded the defense from using the third-party guilt evidence to cross-examine the State's police witnesses about their investigation, including asking why the police—having been told that White, a violent felon, had been near Ms. Stewart's apartment around the time of the assault—decided not to test the footprint found at her apartment against White (it did not match Petitioner) or to test White's clothes for the victim's blood. (Tr. 2695-96.) Initially, the court ruled that it would permit this use of the third-party guilt evidence to probe the police investigation.[6] But immediately before the defense began its cross-examination of police witnesses, the court reversed course and denied the defense any use of this evidence whatsoever.[7]

F. The Forensic Evidence at Trial

The exclusion of the third-party guilt evidence deprived Petitioner of much of his ability to attack the State's case. *See Old Chief v. United States*, 519 U.S. 172, 187-89 (1997)

6. Tr. 2028:9-12 ("THE COURT: ... [T]he defense, while maybe not entitled to present that [Jimmy White evidence] as a defense, certainly would appear to have the right to develop the extent of the investigation."); *id.* at 2683:18-22 ("MR. POPE: [T]hey can ask specifically about Jimmy White? Is that what the court is ruling? THE COURT: Well, if [York Police] had him come in and give a statement, yes."); *id.* at 2685:2-8 ("THE COURT: I'm going to limit it [the cross-examination] to you inquiring ... about whether there were other suspects. ... But if he says yes, then I think [the Defense] have got a right to know who[,] why they ruled that suspect out.").

7. *Id.* at 2711:2-3; *id.* at 2713:16-20 ("MR. NETTLES: ... The court has ruled that I can't discuss in any way, shape or form the investigation of anyone [other than Defendant] in relation to the commission of this crime? THE COURT: That's the ruling.").

(discussing a narrative's power to increase a jury's willingness to draw inferences). Instead of being able to use the third-party guilt evidence to support his claim of innocence and to undermine the prosecution's forensic case, Petitioner was left with only expert testimony attacking the State's forensic evidence collection and testing, as well as a circumstantial case raising the possibility of a police frameup. Even this severely diminished defense, however, was substantial.

With respect to the issue of contamination, the officers who gathered evidence from Ms. Stewart's home conceded that they did not wear gloves while collecting the evidence and placed evidence in paper bags from Ms. Stewart's kitchen. (Tr. 2201-03, 2338.) After all the evidence was collected, Mobley created evidence logs. (Tr. 2561-63.) He testified that while creating the logs he went through all the evidence from the case simultaneously, including both Stewart's and Petitioner's items, without wearing gloves and without washing his hands between handling individual items of evidence. (Tr. 2559, 2561-63.) As defense expert John Kilbourn explained, fiber evidence is easily transferred. (Tr. 3882.) Because Mobley failed to wash his hands or put on new gloves between handling items of evidence obtained from Ms. Stewart and items of evidence obtained from Petitioner, he readily could have transferred fibers between Petitioner's items and Ms. Stewart's. (Tr. 3883-85.) Similarly, as defense experts Janine Arvizu and Peter D'Eustachio explained (and prosecution's expert witness Sam Baechtel confirmed), officers can transfer DNA through such handling. (Tr. 3547, 3766, 3805.) The relatively small amount of blood on Petitioner's shirt, jeans, and underwear (Tr. 3208-09) further supported a cross-contamination theory.

The State's fiber analyst, moreover, compounded the danger of contamination by using the "scraping method" to obtain the fiber samples. This method involves hanging items of evidence in the air and using a metal instrument to scrape off fibers. (Tr. 3886.) As Kilbourn testified, however,

the scraping process often leaves fibers in the air where they remain for varied periods of time. (Tr. 3888.) The airborne fibers may land on items of evidence scraped at a later time in the same locale. (Tr. 3888.) Accordingly, fiber analysts typically minimize the danger of airborne fiber transfer by scraping evidence from the suspect and victim in separate rooms and on different days. (Tr. 3884, 3889.) A different analyst may even handle each item. (Tr. 3889.) Here, the fiber analyst testified that he scraped evidence from Petitioner's belongings and Ms. Stewart's belongings in the same room. (Tr. 3018, 3020.) There is no evidence that he scraped the items on different days. Furthermore, Kilbourn opined that two sets of the allegedly "consistent" fibers came from a third source, meaning that they did not come from either Petitioner's clothing or Ms. Stewart's nightgown and bed sheets. (Tr. 3028, 3038.) Yet the State made no effort to determine the source of these fibers. (Tr. at. 3036.)

Even if the presence of DNA and fibers was not the result of contamination, other evidence cast serious doubt on the State's conclusions about the source of both the DNA and the fibers. With respect to the DNA evidence, Petitioner's expert testified that the charts generated from the DNA mixtures on Petitioner's shirt and underwear exhibited abnormal characteristics that modern science could not explain. (Tr. 3818-26.) In light of the unusual nature of the charts, he opined that the evidence did not establish that the DNA mixture came from Petitioner and Ms. Stewart. (Tr. 3824.) Similarly, defense experts testified that the State's fiber analyst relied on imprecise and outdated methods to determine whether the fibers found on Petitioner's clothing matched the fibers found on Ms. Stewart's bed sheets and nightgown. (Tr. 3887-88, 3890, 3892-96, 3912.) After using a microscope to conclude that the material and general color of the fibers were consistent, the analyst failed to perform either an Optical Properties Refractive Index test (OPRI) or chemical analysis of the fibers' dye. (Tr. 3891, 3893-96.) An OPRI test would have given the fiber analyst a more precise color match while a chemical analysis of the dye could have conclusively established that the fibers were consistent. (Tr. 3891, 3893-96.)

The remaining "forensic evidence" was consistent with Petitioner's defense that the York police framed him. First, Petitioner presented evidence that the palm print that Captain Mobley allegedly found on the interior of Ms. Stewart's door was planted or came from another place. When a person touches a rough or uneven surface, the surface creates striations in his or her print. (Tr. 2897-98.) Both defense and prosecution experts agreed that the palm print attributed to Petitioner contains striations indicative of a rough surface. (Tr. 2896-98, 3990-91.) According to defense expert Donald Girndt, however, the interior of Ms. Stewart's door is not the type of surface that would create such striations. (Tr. 3965, 3990-91.) Mobley's testimony regarding fingerprints was also dubious. For example, he claimed to have been able to lift only two usable prints from the whole apartment—an inherently implausible claim also contradicted by SLED Agent Steven Derrick, who testified that they probably could have used the purportedly "smudged" prints taken from the telephone and pocketbook. (Tr. 2908.) In addition, the donor of a second print found on Ms. Stewart's door was never identified, even though Petitioner's prints did not provide a match. (Tr. 2876.)

Second, the defense presented evidence that Mobley planted the DNA allegedly found on Petitioner's clothing and on the paper towel. The State allegedly lost Ms. Stewart's rape kit which contained her blood, her vaginal swab, her rectal smear, and her saliva.[8] (Tr. 2284, 3372, 3763.) The missing blood samples and rectal smears provided Captain Mobley with ample opportunity to plant DNA on Petitioner's clothing. Despite this, the State failed to test the blood ultimately found on Petitioner's clothing or the DNA ultimately found on the paper towel for the preservatives known to be in the missing blood samples. (Tr. 3562, 3765.) Such testing for preservatives is common

8. Losing the rape kit was only one of SLED's many mistakes. SLED also sent Petitioner's blood sample to the FBI for testing under Ms. Stewart's name and erroneously informed the FBI that Ms. Stewart was Caucasian. (Tr. 3333.)

practice when blood samples are missing because of the danger that they have been used to plant evidence. (Tr. 3770.) The State offered no explanation for its failure to test for the preservatives.

The State's failure to test the blood stains for preservatives known to be in the missing blood samples was even more suspicious in light of the fact that an evidence log Mobley generated made no mention whatsoever of blood or other stains being detected on Petitioner's shirt or underpants, even though other evidence logs referenced the existence of blood or other stains on items of evidence. (Tr. 2619-21.) While the evidence log does note blood on the paper towel, Mobley did not turn the paper towel over to SLED until eight days after he provided SLED with the rest of the evidence. (Tr. 2618-19.) At trial, Mobley failed to give a coherent explanation for failing to promptly send the allegedly bloody paper towel to SLED. (Tr. 2618-19.)

Finally, the State failed to test the money found in Petitioner's wallet for Ms. Stewart's prints. (Tr. 2614, 3944.) As defense expert Girndt testified, SLED was capable of taking fingerprints off currency, and did take fingerprints off currency whenever a local investigator submitted currency to it. (Tr. 3966.) Yet the State failed to take this elementary step that could have either further inculpated or exonerated Petitioner. Instead, it argued that Petitioner's possession of the commonplace amount of $40 somehow implicated him in the crime. (Tr. 4195-96.)

G. The Prosecutor's Closing Argument

In closing argument at the guilt or innocence phase of the trial, the prosecutor, having successfully excluded Petitioner's evidence of third-party guilt, argued that Petitioner's failure to introduce evidence of a third party's guilt showed that he was the guilty party. On numerous occasions, the prosecutor remarked on Petitioner's failure to introduce evidence that a third party committed the crime. (Tr. 4212, 4215, 4220.) Summing up the point, the prosecutor explicitly stated, "if you are going to frame them

(sic) and it's going to be Bobby Holmes, where is the raping, murdering, beating fellow that actually did this thing." (Tr. 4220.)

Defense counsel objected to the prosecution's tactics as soon as the prosecutor ended his closing argument and requested a mistrial. (Pet. App. 28a.) Defense counsel argued that the prosecutor's remarks prejudiced Petitioner because of the exclusion of the third-party guilt evidence, and that a new trial was necessary so that the evidence could be presented in response to the prosecution's comments. *Id.* at 28a-29a. When the trial court denied relief, *id.* at 29a, Petitioner requested a special curative instruction, which was also ultimately denied, *id.* at 30a. The jury then convicted Petitioner on all counts. *Id.* at 1a.

At the sentencing phase, Petitioner once again attempted to introduce the evidence of White's guilt. Petitioner maintained both that the information was relevant mitigating evidence and that its exclusion would amount to a denial of due process. Again, the trial court excluded the evidence. (Tr. 4404.) The jury sentenced Petitioner to death. (Pet. App. 1a.)

H. Petitioner's Direct Appeal

On direct appeal, the South Carolina Supreme Court affirmed Petitioner's conviction and sentence. (Pet. App. at 17a.) The Court did not disturb the trial court's findings that Petitioner had presented sufficient credible evidence from which a jury could conclude that Jimmy White had the opportunity and motive to attack Ms. Stewart and that he had confessed to no fewer than four people. At the same time, the Court did not follow the trial court's rationale for nonetheless excluding the evidence—namely, that the confession evidence was inadmissible hearsay.[9]

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9. Although not germane to this petition, the trial court's hearsay ruling was clearly wrong. White's confessions were admissible under South Carolina Rule of Evidence 801(d)(1).

Instead, the Court affirmed the exclusion of the third-party guilt evidence by establishing, as a practical matter, a new standard for the admission of third-party guilt evidence in cases where the prosecution relies on forensic evidence. As a starting point, the Court noted that, in order to be admissible, third-party guilt evidence must involve "a train of facts or circumstances as tends clearly to point out such other person as the guilty party" or, put differently, must raise "a reasonable inference as to the appellant's own innocence." (Pet. App. at 11a.) In addition, the Court held that, where there is "strong evidence of appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." *Id.* at 12a. In such circumstances, even third-party guilt evidence such as that presented in this case—evidence that, if believed, would directly and conclusively exonerate the defendant—"cannot overcome the forensic evidence" and thus fails the test of admissibility as a matter of law. *Id.*

The Court also declined to address the constitutionality of the State's emphasis in its closing argument on the absence of third-party guilt evidence, asserting that this issue had not been preserved for appellate review because Holmes failed to lodge a "contemporaneous objection." *Id.* at 14a.

Judge Pleicones dissented. *Id.* at 17a-18a. After summarizing the additional evidence presented at trial undermining the integrity of the forensic evidence, he stated, "considering the record as a whole, the State's evidence was not sufficient to negate the 'reasonable inference' of [Petitioner's] innocence[.]" *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

The Supreme Court of South Carolina held that, in cases involving "strong forensic evidence," a defendant has no right to present third-party guilt evidence to the jury, even where that evidence has been found to be credible, is directly inconsistent with the defendant's guilt, and calls into doubt

the reliability of the forensic evidence that forms the basis for its exclusion. Compounding this error, the state courts allowed the prosecutor to emphasize the defense's lack of third-party guilt evidence even though the State had moved successfully to prohibit the defense from introducing its powerful third-party guilt evidence.

These rulings merit review by this Court. The state supreme court's approach to excluding third-party guilt evidence violates basic due process principles and will undermine the search for truth in every South Carolina criminal trial where such evidence is at odds with a prosecution based largely on forensics. Moreover, in countenancing the prosecutor's closing argument, the South Carolina court violated this Court's due process jurisprudence guaranteeing capital defendants a fair opportunity to rebut the arguments made against them.

I. South Carolina's Approach To Third-Party Guilt Evidence, Including Its Unique Per Se Exclusion Of Third-party Guilt Evidence When The Prosecution's Evidence Is "Strong," Conflicts With This Court's Well-Established Jurisprudence Governing A Criminal Defendant's Constitutional Right To Present A Complete Defense.

This Court has long recognized that, whether rooted in the Fourteenth Amendment's Due Process Clause or in the Sixth Amendment's Compulsory Process or Confrontation Clauses, the U.S. Constitution guarantees every criminal defendant "'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *see also Washington v. Texas*, 388 U.S. 14, 19 (1967) (Defendant "has the right to present his own witnesses to establish a defense."); *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) (same).

This right to call defense witnesses is central to two basic premises of our system of criminal justice: first, that the prosecution's case must "'survive the crucible of meaningful adversarial testing,'" *Crane*, 476 U.S. at 690-91 (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)); and second, that within this crucible, the jury—not the judge—serves as "the lie detector" assessing the relevant, competent evidence. *United States v. Scheffer*, 523 U.S. 303, 313 (1998). As this Court summarized in *Washington v. Texas*, "[t]he conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined" by the trier of fact. 388 U.S. at 22.

Applying these principles, this Court has invalidated numerous evidentiary bars to the admission of defense witness testimony. *E.g.*, *Crane*, 476 U.S. at 691 (overturning bar on introduction of evidence regarding the circumstances of a confession); *Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (overturning bar to admission of hypnotically refreshed testimony); *Washington*, 388 U.S. at 22 (overturning bar on testimony by accomplices or accessories). Indeed, in a case closely analogous to this one, this Court declared unconstitutional the application of certain Mississippi evidentiary rules that barred a defendant from introducing evidence of third-party guilt, specifically the testimony of three witnesses that another party had confessed to the crime. *See Chambers*, 410 U.S. at 302 (combination of "voucher" and hearsay rules precluded introduction of third-party confessions as well as effective cross-examination of witness who repudiated prior confession and offered an alibi).

In all these cases, the Court recognized that state courts have considerable latitude in fashioning and applying evidentiary rules "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Scheffer*, 523 U.S. at 330 n.17 (quoting *Chambers*, 410 U.S. at

302). But this Court has never countenanced rules excluding "competent, reliable evidence" from percipient witnesses who would testify directly to a defendant's innocence. To the contrary, the Court has struck down "arbitrary" rules regarding witness competence and "mechanistic" approaches to the reliability of evidence. In so doing, the Court has sought to preserve the accused's right to present a defense and to protect the jury's role as the finder of fact and arbiter of witness credibility in criminal cases. *Chambers*, 410 U.S. at 302; *Washington*, 388 U.S. at 23.

South Carolina's rule governing the admissibility of third-party guilt evidence cannot be squared with these core constitutional tenets. Under South Carolina law, a defendant cannot introduce third-party guilt evidence unless the third-party guilt evidence, standing alone, "overcomes" the State's evidence and establishes "a reasonable inference . . . as to his own innocence" or, put differently, "such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party." (Pet. App. at 11a-12a (quoting *State v. Gregory*, 16 S.E.2d 532, 534 (S.C. 1941))). Worse still, when the State presents "strong forensic evidence" of guilt, South Carolina flatly prohibits the defendant from introducing third-party guilt evidence because, in such circumstances, third-party guilt evidence purportedly "does not raise a reasonable presumption" of innocence and "cannot overcome" the State's case. *Id.* at 12a (citing *State v. Gay*, 541 S.E.2d 541 (S.C. 2001)). This is true even, as here, where the third-party guilt evidence undermines the forensic evidence on which the exclusionary rule is based, because the "strength" of the prosecution's case is measured solely on the basis of the State's evidence regardless of any countervailing defense.

South Carolina's approach to third-party guilt evidence offends at least three constitutional principles.

First, its limitation on third-party guilt evidence, including a per se exclusion where the prosecution case is "strong," offends the general constitutional rule described above that a defendant is entitled to put before the jury the

testimony of competent witnesses with first-hand knowledge directly relevant to the question of guilt or innocence.

Second, it relieves the prosecution of its constitutionally imposed burden of proving guilt beyond a reasonable doubt by making the admissibility of relevant defense evidence hinge on a defendant's ability to overcome the prosecution's evidence and raise a reasonable inference of innocence. *E.g. In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Under South Carolina's approach, a defendant does not merely have to show that the evidence in question is genuinely probative of third-party guilt (as opposed to conjectural) or even that the evidence, if credited, is sufficient when considered together with other defense evidence to raise a reasonable doubt regarding innocence. Instead, he must show that the third-party guilt evidence, standing alone, "tend[s] clearly" to establish third-party guilt and further, "overcome[s]" the State's evidence to the point of raising a "reasonable inference" of innocence. (Pet. App. at 11a-12a.)

South Carolina thus puts a defendant—even a capital defendant like Petitioner—to a greater burden in seeking to admit exculpatory evidence than the defendant bears in trying to win acquittal before the jury. While the State's third-party guilt rule does not explicitly alter the prosecution's burden to prove guilt beyond a reasonable doubt, it lets the State meet that burden after forcing the defense to carry a preliminary burden of overcoming the prosecution's evidence in order to get its own competent and relevant exculpatory evidence before the jury. This Court long ago recognized that the reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, 397 U.S. at 363. Yet in South Carolina, the prosecution gets to attempt to prove guilt beyond a reasonable doubt with the evidentiary deck stacked in its favor.

Third, in a related and equally serious flaw, South Carolina's approach also deprives a defendant of his right

to have a jury determine all facts relevant to the issue of guilt or innocence. *United States v. Booker*, 125 S. Ct. 738 (2005); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In South Carolina, when a defendant seeks to introduce third-party guilt evidence, the judge does not merely determine whether the evidence is relevant or more probative than prejudicial (which are, of course, typical gatekeeper functions). Fed. R. Evid. 401, 403. Instead, before ruling on the admissibility of third-party guilt evidence, the judge becomes a preliminary trier-of-fact to determine the credibility of and weight to be given to the defendant's proffered evidence in relation to the State's evidence; furthermore, where the State's evidence (especially forensic evidence) is deemed "strong," the judge must apply a per se exclusion. This approach deprives a defendant of his right to have the jury find the facts essential to guilt, since the jury's fact-finding is being partially pre-determined and inherently skewed by the role South Carolina assigns to the judge.

This case demonstrates just how pernicious these failings are. The trial court specifically found that the third-party guilt evidence was credible—that it was sufficient to show that White confessed multiple times to the crime; that he was near the site of the crime near the time of the crime; that he generally fit the victim's description of her attacker; that he gave a false alibi; that he had some propensity for older women like the victim; and that he was a violent person. (Pet. App. at 20a-21a.) This evidence, including four mutually corroborating third-party confessions, supported each aspect of Petitioner's defense, namely that the forensic evidence was tainted, inconclusive, or planted, and that Petitioner's own prosecution was the product of a rush to judgment by police offers angered by their previous run-in with him. Like the improperly withheld third-party guilt evidence that compelled this Court to order a new trial in *Kyles v. Whitley*, 514 U.S. 419 (1995), the third-party guilt evidence here "would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation,

as well." *Id.* at 445. Indeed, it can hardly be doubted that the evidence against White would have been sufficient to sustain his conviction for the crime had he been tried for it. Yet under South Carolina's approach, that evidence was per se inadmissible because the state supreme court deemed the State's evidence, evaluated without reference to the defense's rebuttal, to be "strong."[10]

Such an approach advances no discernible legitimate state interest. Naturally, courts have an interest in ensuring that the evidence admitted bears indicia of reliability and also that trials do not get bogged down in litigation over peripheral matters. For this reason, many states provide mechanisms for excluding third-party guilt evidence where that evidence is conjectural or does not genuinely support the defendant's claim of innocence. Such limitations simply are variants on the usual inquiry into relevance or into the probative value of evidence compared to its propensity for prejudice or distraction. But these limitations are a far cry from requiring a defendant to overcome the prosecution's evidence and establish a "reasonable inference" of innocence as a prerequisite to admitting evidence, much less a per se rule of exclusion where the prosecution forensic case is "strong."[11]

South Carolina's approach is "disproportionate" to any legitimate state interest while infringing on "a weighty interest

10. To the minimal extent the state supreme court suggested that the forensic evidence tended to exculpate White, it simply erred. The fact that White's DNA did not appear on clothing samples that consisted mainly of Petitioner's clothes is unremarkable. Because White's clothes were never tested and because the victim bathed immediately after the attack, the absence of DNA evidence, in and of itself, neither inculpated nor exculpated White.

11. The problems with South Carolina's approach are substantially exacerbated by the elevated status it gives to forensic evidence in comparison to other types of evidence. Forensic evidence is only as good as the evidence collection methods and testing techniques actually used, and will also produce false results if the defendant has been framed. Accordingly, where the defendant seeks to impeach forensic evidence on one or more of these grounds, it makes no sense to exclude relevant and material third-party evidence based on the strength of the forensic evidence. The logic of doing so is perfectly circular.

of the accused." *Scheffer*, 523 U.S. at 308. Once third-party guilt evidence is determined to be materially probative of innocence, the assessment of that evidence against the strength of the prosecution's case must be for the jury, not the judge. To provide otherwise, as South Carolina has without reference to or regard for the constitutional standards cabining the State's authority, is to handicap arbitrarily defendants who would deploy evidence of third-party guilt by partially exempting the prosecution from proving its case in "the crucible of meaningful adversarial testing." *Crane*, 476 U.S. at 690-91.[12]

Several states have repudiated South Carolina's burden-shifting "train of facts/reasonable inference" of innocence approach to admitting third-party guilt evidence, and no state (so far as we can discern) applies the evidence-weighing per se exclusion South Carolina has adopted for strong forensic evidence cases.[13] This Court should grant review here to clarify

12. South Carolina's treatment of third-party guilt evidence deserves special scrutiny because it is not a neutral rule of evidence. By its nature, it limits only the defense and not the prosecution. *Compare Scheffer*, 523 U.S. at 327 n.12 (exclusion of polygraph less problematic because it applies to both sides).

13. For a relatively recent discussion of various approaches to admissibility standards for third-party guilt evidence, *see* Brett C. Powell, *Perry Mason Meets the "Legitimate Tendency" Standard of Admissibility (And Doesn't Like What He Sees)*, 2001 Evidence Symposium, 55 U. Miami L. Rev. 1023 (2001).

California, Idaho, and New York have abandoned the "train of facts" standard in favor of more liberal standards. *E.g.*, *People v. Hall*, 718 P.2d 99, 104 (Cal. 1986) (adopting undue prejudice analysis based on state rules of evidence); *State v. Kerchusky*, 67 P.3d 1283, 1287-88 (Idaho Ct. App. 2003) (same); *People v. Primo*, 753 N.E.2d 164, 167 (N.Y. 2001) (same).

Washington and Virginia continue to use the "train of facts" test, but, unlike South Carolina, do not preclude third-party evidence that meets this test where the State's case is based on "strong forensic evidence." *See State v. Maupin*, 913 P.2d 808, 814 (Wash. 1996) (en banc) (testimony that "casts substantial doubt on the State's version of the crime" must be admitted); *Oliva v. Commonwealth*, 452 S.E.2d 877, 880 (Va. Ct. App. 1995) ("[Q]uestion is whether 'facts and circumstances tend[ed] clearly to point out some other person as the guilty party,' thereby raising a question for the jury whether reasonable doubt existed of [defendant's] guilt.").

the constitutional limits on excluding third-party guilt evidence, and, more specifically, to vindicate the integrity and reliability of the process by which the all-important issue of guilt or innocence are decided in South Carolina.

II. After Successfully Urging The Trial Court To Bar Petitioner From Introducing Evidence Of Third-Party Guilt, The State's Assertion In Closing Argument That The Absence Of Such Evidence Demonstrated Petitioner's Guilt Violates The Due Process Right Of Capital Defendants To Fair Rebuttal Recognized By This Court In *Simmons v. South Carolina* And *Skipper v. South Carolina*

Review is also warranted because the State's exploitation in its closing argument of the absence of third-party guilt evidence after the State moved successfully to prohibit Petitioner from introducing that very evidence conflicts with *Simmons v. South Carolina*, 512 U.S. 154 (1994), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), two other South Carolina capital cases. In both those cases, the Court held that the due process right of capital defendants to fair rebuttal was violated when, at the State's urging, petitioners were barred from presenting evidence that would have afforded them an "opportunity to deny or explain" assertions about the evidence against them made by the State during closing argument. *Simmons*, 512 U.S. at 164 (plurality opinion); *id.* at 175 (O'Connor, J., concurring in the judgment); *Skipper*, 476 U.S. at 5 n.1; *id.* at 10 (Powell, J., concurring in the judgment).[14]

14. The due process right of capital defendants to fair rebuttal applied in *Simmons* and *Skipper* derives from *Gardner v. Florida*, 430 U.S. 349 (1977). The defendant in *Gardner* was sentenced to death based on "confidential information" contained in the prosecution's pre-sentence report that was "not disclosed to the defendant or his counsel." *Id.* at 358 (plurality opinion). The Court overturned the sentence. The plurality concluded that the defendant "was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362 (plurality opinion); *see id.* at 365 (Brennan, J., concurring in part).

In *Simmons*, the State contended in closing argument at sentencing that the defendant's future dangerousness should be considered in determining the appropriate punishment, and that to eliminate that threat, the defendant should be executed. 512 U.S. at 157. To rebut that contention, the defendant requested a clarifying instruction that he was ineligible for parole under State law, and that therefore, if given a life sentence, he would not pose a future danger to society. *Id.* at 158. The prosecutor objected to the proposed instruction and the trial court refused to give it. *Id.* at 159-60.

In overturning the defendant's death sentence, the Court held in *Simmons* that due process was violated because, in closing argument, "[t]he State raised the specter of Petitioner's future dangerousness generally, but then thwarted all efforts by Petitioner to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus . . . would not pose a future danger to society." *Id.* at 165 (plurality opinion). The Court acknowledged that the State could have asserted that, even though defendant was parole ineligible, he would still "pose a danger to others in prison and that executing him is the only means of eliminating that threat." *Id.* at 166 n.5 (plurality opinion). But that is not what the State did in *Simmons*. Instead, it "misl[ed] the jury by concealing accurate information about the defendant's parole ineligibility. The Due Process Clause will not tolerate placing a capital defendant in a straightjacket by barring him from rebutting the prosecution's arguments of future dangerousness with the fact that he is ineligible for parole under state law." *Id.* Justice O'Connor's concurring opinion (joined by Chief Justice Rehnquist and Justice Kennedy) echoed these themes:

> When the State seeks to show the defendant's future dangerousness . . . the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case . . . [I]n such a case the

> defendant should be allowed to bring his parole ineligibility to the jury's attention—by way of argument by defense counsel or an instruction from the court—as a means of responding to the State's showing of future dangerousness.

Id. at 177 (O'Connor, J., concurring in the judgment).[15]

The Court confronted a similar scenario in *Skipper* The defendant there had been convicted of capital murder and rape. In closing argument at sentencing, the State asserted that, based on evidence of the defendant's alleged jail misconduct, he would "pose disciplinary problems if sentenced to prison and would likely rape other prisoners." 476 U.S. at 4. This remark followed on the heels of the State's

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15. Twice since *Simmons*, this Court has granted certiorari and reversed death sentences on account of South Carolina's failure to adhere to *Simmons*. In *Shafer v. South Carolina*, 532 U.S. 36 (2001), the Court observed that "South Carolina has consistently refused to inform the jury of a capital defendant's parole eligibility status," even when required to do so after *Simmons*. *Id.* at 48. The Court rejected the State's contentions that *Simmons* was inapplicable to a new sentencing scheme, and that the jury had, in any event, been properly instructed on the defendant's parole eligibility status. *Id.* at 50-52. In *Kelly v. South Carolina*, 534 U.S. 246 (2002), the State presented evidence at sentencing in support of imposition of the death penalty (i) that defendant was a sadist with an "inclination to kill anyone who rubbed him the wrong way," and (ii) that while jailed, defendant had made a weapon and "taken part in an escape attempt even to the point of planning to draw a female guard into his cell where he would hold her hostage." *Id.* at 249. After the State presented this evidence, defendant sought an instruction under *Simmons* that he was ineligible for parole. The State objected, claiming that *Simmons* was inapplicable because the State had not placed defendant's future dangerousness at issue and was not going to argue future dangerousness in its summation; the trial court declined to give the instruction. *Id.* In its close, the State proceeded to call defendant a "butcher," "Bloody Billy," and "Billy the Kid"; to describe him as "quick-witted"; and to say "[d]oesn't that make someone a little more dangerous." *Id.* at 249-50. Defendant objected to the State's close, but the objection was overruled and the trial court again refused to give an instruction on parole ineligibility. *Id.* at 250. In reversing the death sentence, this Court held that the State had in fact raised future dangerousness both in its presentation of evidence and in its close, and that therefore, under *Simmons*, the jury should have been instructed on parole ineligibility. *Id.* at 252-57.

successful effort to bar, as irrelevant, the introduction by the defendant of evidence of his good behavior in jail to show that he would not present a threat to prison security if the death sentence was not imposed. *Id.* at 3-4.

This Court overturned the death sentence in *Skipper* on both Eighth Amendment and due process grounds. *Id.* at 4-5 & n.1. With respect to due process, the Court observed that the prosecutor's closing argument, which "urged the jury to return a sentence of death in part because the defendant could not be trusted to behave if he were simply returned to prison," underscored the relevance of evidence of the defendant's good conduct in jail that the trial court had excluded. *Id.* at 5 n.1. The Court concluded that

> Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only [the Eighth Amendment] that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain.

Id.; *see id.* at 10 (Powell, J., concurring in the judgment) (due process was violated because Petitioner was "not permitted to deny or explain evidence" of his behavior in jail "on which his death sentence may, in part, have rested," and "[t]his error was aggravated by the prosecutor's closing argument, which emphasized and exaggerated Petitioner's misconduct. . . .").

The State's tactics in this case mirror the State's conduct that was held to violate due process in *Simmons* and *Skipper*. After successfully advocating that the trial court exclude all evidence of third-party guilt that Petitioner sought to introduce, the State in its closing argument trumpeted that Petitioner's failure to present evidence of third-party guilt proved that he was guilty. In particular, the prosecutor exclaimed: "If you are going to frame them (sic) and it's

going to be Bobby Holmes, where is the raping, murdering, beating fellow that did this thing." (Tr. 4220.) This tracks the State's practice that was condemned in *Simmons* and *Skipper*. In all three cases, the trial courts, at the State's urging, blocked the defense from presenting evidence on a critical issue—the petitioners' dangerousness in *Simmons* and *Skipper*, and the identity of the perpetrator here. And in all three cases, the State exploited those evidentiary rulings by highlighting, in closing argument, the absence of the evidence the State sought to suppress as a basis to sentence the defendant to death (*Simmons* and *Skipper*) or to find him guilty (this case). In sum, review is warranted because the State's remarks in its close on an evidentiary void that the State itself created cannot be squared with the holdings in *Simmons* and *Skipper* that due process guarantees capital defendants an opportunity to rebut assertions made by the State in summation about critical evidentiary issues on which guilt or innocence, or life and death, may turn.

The South Carolina Supreme Court declined to address the constitutionality of the State's comments on the lack of evidence of third-party guilt during closing argument. Instead, in a cryptic one-sentence parenthetical, it said that Petitioner had not preserved the issue because his counsel failed to lodge a "contemporaneous objection" to those comments. (Pet. App. at 15a.) It is difficult to ascertain what state procedural rule the South Carolina Supreme Court was applying. Apparently, the court was saying that defense counsel must interrupt a prosecutor's closing argument and object at the exact moment of the offending comment, instead of waiting until the end of the close, as Petitioner's counsel did. Assuming that this is the procedural rule that was applied, it does not furnish adequate grounds for this Court to deny review of the State's remarks in its closing argument on the absence of evidence of third-party guilt.

This Court repeatedly has admonished that, while "failure to comply with a state procedural rule may constitute an independent and adequate state ground barring [this Court's] review of a federal question[,] a state

procedural ground is not adequate unless the procedural rule is strictly or regularly followed. State courts may not avoid deciding federal issues by invoking procedural rules that do not apply evenhandedly to all similar claims." *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982). That principle applies here. Simply put, the South Carolina Supreme Court has not consistently required defense counsel to interrupt prosecutors in the middle of their closing argument in order for objections to be deemed contemporaneous.

In some cases, the South Carolina Supreme Court has indicated that a defendant's objection to statements in the prosecutor's closing argument only need be sufficiently contemporaneous such that, if the objection is sustained, the trial judge has time to give a curative jury instruction. *See, e.g., State v. Tucker*, 478 S.E.2d 260, 267 (S.C. 1996); *State v. Patterson*, 482 S.E.2d 760, 766 (S.C. 1997); *State v. McIver*, 120 S.E.2d 393 (S.C. 1961). These cases are in keeping with the South Carolina Supreme Court's pronouncement in contexts other than closing argument that the purpose of the contemporaneous objection requirement is to afford "the trial judge an opportunity to cure any alleged error." *State v. Pauling*, 470 S.E.2d 106, 109 (S.C. 1996); *see State v. Torrence*, 406 S.E.2d 315, 327 (S.C. 1991) ("A contemporaneous objection requirement . . . allows potential errors to be prevented or cured.").

To be sure, in at least one case, the South Carolina Supreme Court has suggested that criminal defendants must interpose an objection to a statement in the prosecutor's closing argument immediately after the statement is made, instead of waiting for the conclusion of the close. *See State v. Rabon*, 272 S.E.2d 634, 635-36 (S.C. 1980). But even in that case, the court indicated that the purpose of the contemporaneous objection requirement is to call the offending statement in the closing argument to the trial judge's attention "such that a corrective instruction, if needed, may be given." *Id.* at 636.

All told, the procedural rule apparently invoked by the South Carolina Supreme Court has not been strictly or regularly followed by that court; thus, it imposes no barrier to this Court's review of the serious due process issue generated by the State's close. Rather, the test is whether the trial court had time to cure the error before the case was submitted to the jury. That standard was met here. In objecting to the State's emphasis on the absence of third-party guilt evidence as soon as the State finished its close, Petitioner's counsel gave the trial court a chance to cure the error before the case was submitted to the jury. (Pet. App. 28a.) Petitioner's counsel expressly requested a mistrial so that Petitioner could be afforded an opportunity to present such evidence in order to rebut the State's comment. *Id.* The trial court denied that request. Alternatively, Petitioner's counsel requested that the trial court issue a curative instruction regarding the comment. (Pet. App. 29a.) The trial court denied that request as well, and did not even instruct the jury to ignore the comment. (Pet. App. 30a.)[16] In short, for purposes of satisfying the procedural requirement that objections be made in a timely manner so that trial judges have an opportunity to take curative steps before sending the case to the jury, it would have made no difference if Petitioner's counsel objected in the middle of the State's close, rather than at the end of it.

16. The trial court gave only a general instruction that arguments by counsel that were unsupported by the evidence were to be disregarded. (Pet. App. 29a-30a.) In applying that instruction, however, jurors likely would conclude that the evidence to be considered would include the absence of evidence of third-party guilt to which the State referred in its closing argument. Thus, the instruction did not cure the error stemming from the State's reference.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA FILED NOVEMBER 1, 2004

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Bobby Lee Holmes,

Appellant.

Opinion No. 25886
Heard February 19, 2004 - Filed November 1, 2004

AFFIRMED

JUSTICE MOORE: Appellant was convicted[1] of murder, first degree burglary, first degree criminal sexual conduct (CSC), and robbery. He received a death sentence for the murder, the jury having found three statutory aggravating circumstances,[2] and received three concurrent

1. This was appellant's second capital trial. His direct appeal from the first trial was affirmed, *State v. Holmes*, 320 S.C. 259, 464 S.E.2d 334 (1995), *cert. denied*, 517 U.S. 1248, 116 S.Ct. 2507, 135 L.Ed.2d 197 (1996); appellant was subsequently granted a new trial on post-conviction relief.

2. The aggravating circumstances were murder during the commission of burglary, murder during the commission of CSC, and physical torture.

sentences for the other offenses.[3] Appellant alleges errors occurred in both the guilt phase and the sentencing phase of his trial. We affirm appellant's convictions and sentences.

FACTS

At approximately 6:15 a.m. on December 31, 1989, the eighty-six-year-old victim opened her door in response to someone's knocking. A black male forced his way into her apartment, beat her about the chest and head, and demanded money. The man forced the victim into her bedroom where he ripped off her nightgown and anally raped her. He took $40 from her purse and left the apartment after ripping the living room phone from the wall.

At 7:45 a.m., the victim's friend (Mrs. Thrasher) phoned to check on the victim. After six or seven rings, the victim answered and told Mrs. Thrasher she had been beaten, anally raped, and robbed. Mrs. Thrasher called another friend, Mrs. Byers, who had an automobile and a key to the victim's apartment. Mrs. Byers went to the apartment, noticed it was messy, spoke with the victim who told her the assailant was "big and dark," and then drove to the police department since the living room phone had been pulled off the wall.[4]

The first officer on the scene was Dale Edwards. The victim told him that around 6 or 6:30 a.m. she heard knocking

3. The imprisonment terms were life for burglary; thirty years for CSC; and fifteen years for robbery.

4. The victim apparently answered Mrs. Thrasher's call using her bedroom phone.

at her front door and that when she opened the door, a black male forced his way in. She had taken a shower before the police arrived. Officer Edwards removed the sheets and pillowcase from the bed for use as evidence, and placed the items in a paper grocery bag taken from the victim's kitchen. Lt. Barnett arrived and assisted in the evidence collection. A pink nightgown, a housecoat, and a rag were removed from the bathroom and placed in another grocery bag. The victim gave Officer Edwards a pink paper towel with blood on it that he placed in a manila envelope brought to the scene by Captain Mobley, the third officer on the scene.

While the three police officers were there, two paramedics arrived to transport the victim to a local hospital emergency room. Blood samples were taken, but a rape kit was not processed because the victim was complaining of hip pain and medical personnel were awaiting X-rays before performing the exam. The blood testing kit used to take samples from the victim had "expired" several months earlier.[5] Before the victim's mental state began to deteriorate, she described her attacker to an emergency room nurse as a black male in his late twenties. On February 19, 1990, the victim was transferred to a nursing home where she died in March. The cause of death was pneumonia, which developed as the consequence of her severe brain injury.

5. Appellant includes the use of an expired kit in his argument that the forensic evidence was compromised. There was evidence, however, that the expiration date is a manufacturer's "guess" as to how long the vacuum in the blood collection vials will remain good, and that the kit can be used after that date if the vacuum remains effective.

Captain Mobley testified he arrived at the victim's apartment as the EMS personnel were transporting her out the door. He took custody of the evidentiary items from Officer Edwards and Lt. Barnett. He sent Officer Edwards door to door in the neighborhood and instructed Lt. Barnett to go to the hospital and speak with the victim.

Lt. Barnett recorded the victim's statement at the hospital emergency room before she became confused. She described her attacker's clothing: "a dark jacket, must have been blue or black, must have been black;" "a pair of those funny looking pants ... not the old pant, but something that's kind of mixed up you know;" his hair: "kind of long. Not too long, but a little longer than you usually wear it;" she then said: "he was middle aged. He was young. He was not too young. And he, as I remember, his hair was not short or not too long." The victim described her attacker as dark skinned, "not too heavy. Not too slim."

Later that day, Officer Edwards talked to several of the victim's neighbors. Ms. Boyd told him she heard knocking at her door about 3 a.m.; Mr. Lynn, who lived next door to the victim, reported knocking between 5:30 a.m. and 6:30 a.m.; and Ms. Diggs, who lived on the other side of the victim, heard someone knocking on her door around 6 or 6:30 a.m.

Officer Grady Harper testified he was dispatched to an apartment complex near the victim's residence at about 4:43 a.m. on December 31, 1989. A number of people, including appellant, were making a disturbance, and Officer Harper told them to quiet down and move on. Appellant was unruly, and Officer Harper called for back-up to assist in arresting

appellant. When the additional officers arrived, appellant ran. Officer Harper saw appellant get into a car; Officer Harper gave chase in his patrol car. The driver stopped the car and appellant ran from it. The last time Officer Harper saw appellant was about 5:30 a.m. and the other officers were chasing appellant. One of the "chasing" officers testified he lost sight of appellant at about 5:20 a.m. Appellant was wearing a black sweater with a hood and blue jeans.

Captain Mobley testified that after Officer Edwards and Lt. Barnett left the victim's apartment; he locked the front door and began processing the scene. He seized one more paper towel, the telephone touched by the assailant, and the victim's purse. He then dusted the apartment for fingerprints. On the interior side of the front door he photographed and lifted a palm print located slightly above the doorknob. Captain Mobley also photographed and lifted a print from the outside of the front door. The inside palm print was later identified as that of appellant.

Appellant was arrested on the afternoon of December 31, 1989, at his father's home in York, and denied ever having been inside the victim's apartment. When the police arrived, appellant was wearing a black hooded sweatshirt, underwear, and socks. He dressed in jeans before being transported by the police. While he was dressing, Officer Boot Smith noticed a tank top that appeared to have blood on it and asked if the police officers could take it. Appellant consented and stated the blood came from a fight he had been involved in the night before at a bar.

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Forensic evidence linked appellant to the crime scene. In addition to the palm print found on the victim's door, the State introduced evidence that:

(1) fibers consistent with a black sweatshirt owned by appellant were found on the victim's bed sheets;

(2) a blue acrylic fiber was found on the victim's pink nightgown, and another on appellant's blue jeans: they "could have come from the same common source or it could have come from different sources, but indeed they do ... match each other;"

(3) microscopically consistent fibers were found on the pink nightgown and, in the form of a "fiber pill," on appellant's underwear;

(4) appellant's underwear contained a mixture of DNA from two individuals and 99.99% of the population other than appellant and the victim were excluded as contributors to that mixture; and

(5) appellant's tank top was found to contain a mixture of his blood and the victim's blood.

The defense theory was two-fold. First, it sought to discredit the forensic evidence by showing the evidence was mishandled and by demonstrating the many opportunities for contamination because of unprofessional errors. The defense also sought to suggest that the alleged contamination was not merely the result of simple negligence, but part of a plot on the part of certain law enforcement officers to see that

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appellant was convicted of these crimes. In connection with this prong of the defense strategy, appellant sought to introduce evidence of third party guilt.

ISSUE

Whether the circuit court erred by refusing to admit evidence of third party guilt?

DISCUSSION

At a pretrial hearing, appellant proffered evidence of third party guilt. Specifically, he sought to introduce evidence at trial that the crimes were actually committed by Jimmy McCaw White (Jimmy).

1. *Pre-trial testimony*

Like appellant, Jimmy is a black male. At the time of the victim's murder, he was twenty-two years old; appellant was eighteen. Jimmy's hair was longer than appellant's and Jimmy had lighter skin than appellant.

Several witnesses placed Jimmy in the victim's neighborhood near 6 a.m. on December 31, 1989. Frenetta Johnson testified she saw Jimmy going toward the apartments where the victim lived between 4:30 and 5:30 a.m. Later in her testimony, she narrowed the time to "from four-thirty to something to five." Meshelley Gilmore testified she observed Jimmy in an apartment parking lot as she drove away from her home at about 3:30 or 4 a.m., and that he was still there when she returned at 4:30-4:45 a.m. These apartments were

near the victim's complex. Mrs. Gilmore was awakened by a police officer knocking on her door at 7:30 a.m. She told him she had seen Jimmy hanging around the parking lot earlier that morning.

Deloris Brown testified she saw Jimmy walking down the victim's street in the direction of the victim's apartment between 4 and 5 a.m. on December 31, 1989. Eighty-seven-year-old Anna Boyd, a resident of the same apartment complex as the victim, testified that someone knocked on her door during the night of December 30-December 31. The knocker said, "Open the door, my man, this is Jimmy, open the door." These are appellant's "proximity" witnesses.

Appellant also presented several witnesses who testified that Jimmy had acknowledged that appellant was "innocent" or to whom Jimmy had admitted his guilt. Thomas Murray testified that Jimmy said he knew appellant was innocent, and that he (Jimmy) could not be brought to court for it. Ken Rhodes testified he asked Jimmy whether the word on the street, that Jimmy was the victim's murderer, was true and that Jimmy "put his head down and he raised his head back up and he said well, you know, I like older women .... and he never called the lady's name but you know he say that he liked old women and that yeah he did what they say he did and you know that somebody else was locked up for it. And you know it's like he didn't have no regrets about it at all." Rhodes went on to testify that "[Jimmy] didn't say exactly what he done, he just told me that she had some good stuff ... He said that he didn't kill the lady. The lady was alive when he left...."

Mattie Mae Scott testified that in October 1997 she was at her son's house when Jimmy came to visit. Jimmy was "partially intoxicated," and when the others began talking about the 'old lady in York' that Jimmy had raped and murdered, Jimmy said, "Yes, I did it but [appellant] is going to fry for it."

The defense's "star witness" was Stephen Westbrook.[6] He testified that in 1990 and again in 1994 Jimmy told him he had broken into the victim's house and raped her. Jimmy told Westbrook that Officer Boot Smith[7] had told Jimmy to keep quiet about his guilt. Westbrook further testified that Officer Smith and Investigator Potts came to see Westbrook before appellant's first trial and offered to get him out of jail if he would testify that appellant had confessed to him. Westbrook testified that in June 2000, about two months before this pretrial hearing, he was brought to Rock Hill from Kirkland Correctional Institute. In Rock Hill, he was confronted by several employees of the solicitor's office who sought to convince him to testify against appellant in the upcoming second trial. Westbrook stated that the solicitor's office employees acknowledged to him that they had manufactured underwear evidence incriminating appellant. Westbrook also testified that Jimmy told him that Officer Smith was out to "frame" appellant, and that even appellant's former attorney had urged him to testify against appellant. Finally, Westbrook testified an employee of the solicitor's

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6. Westbrook's credibility was called into question by cross-examination and by impeachment.

7. Boot Smith was deceased at the time of this trial.

office stated that, in addition to the manufactured underwear evidence, they had lifted one of appellant's palm prints from the county jail door to use against him at trial. These are appellant's "confession" witnesses.

Further, the defense called a witness who testified that when asked why he would not confess, Jimmy told him "it's all over and done with and [appellant] is going to do the time for it."

The former receptionist at the York Public Defender's Office testified that Jimmy brought up the crime in conversation with her one day, and remarked that he did not believe appellant was guilty, that maybe Jimmy knew who did it, and that everybody on the street knew.

Finally, the defense called Jimmy to testify at the pretrial hearing. The trial judge instructed Jimmy he had the right to remain silent and the right to an attorney, and warned Jimmy that anything he chose to say could be used against him. Jimmy declined the offer of an attorney and opted to testify. Jimmy testified he left York and was home in Sharon by 2 a.m. on December 31, 1989. He claimed to have ridden with Junior Lytle. Lytle, however, testified at the pretrial hearing and denied driving Jimmy home to Sharon that night. Jimmy denied telling Stephen Westbrook that he had raped and killed the victim and denied confessing in the presence of Thomas Murray or John Dixon or telling the York Public Defender's receptionist that he knew who killed the victim.

2. *Standard for admitting third party guilt*

We have held that a defendant seeking to present evidence of third party guilt must meet this standard:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) (citing 16 C.J. 560).

The *Gregory* court went on to cite from 20 Am. Jur. 254:

> But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is

> on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

Id., 198 S.C. at 104-105, 16 S.E.2d at 535. Further, in *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001), we held that where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.

Appellant fails to meet the standard set out in *Gregory* and *Gay* due to the strong evidence of his guilt. He simply cannot overcome the forensic evidence against him to raise a reasonable inference of his own innocence. This evidence included: (1) appellant's palm print was found just above the door knob on the interior side of the front door of the victim's house; (2) fibers consistent with a black sweatshirt owned by appellant were found on the victim's bed sheets; (3) matching blue fibers were found on the victim's pink nightgown and on appellant's blue jeans; (4) microscopically consistent fibers were found on the pink nightgown and on appellant's underwear; (5) appellant's underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than appellant and the victim were excluded as contributors to that mixture; and (6) appellant's tank top was found to contain a mixture of appellant's blood and the victim's blood.[8]

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8. Although appellant claims the forensic evidence was mishandled and therefore was inadmissible, the fact the forensic evidence may have been compromised by the unprofessional manner (Cont'd)

Further, besides the forensic evidence, there was evidence that appellant matched the description of the perpetrator given by the victim and there was evidence that appellant was fleeing from police officers and was in the area of the victim's house prior to the time she was attacked.

Regarding appellant's claim that he should have been allowed to present evidence that Jimmy White may have been the perpetrator of the crimes, the State proffered the testimony of a Federal Bureau of Investigations forensic examiner. This examiner testified that, after testing Jimmy White's specimen,*i.e.* a dried bloodstain, and comparing the specimen to the clothing items that were tested as part of the investigation, White was excluded.

Given the overwhelming evidence of appellant's guilt, the circuit court did not err by excluding the evidence of third party guilt.

(Cont'd)
in which the evidence was collected goes to the weight of the evidence, not to its admissibility. *See State v. Carter*, 344 S.C. 419, 544 S.E.2d 835 (2001) (weak links in chain of custody go to weight, not admissibility); *State v. Smith*, 326 S.C. 39, 482 S.E.2d 777 (1997) (storage of blood sample in police officer's home goes to weight of evidence not its admissibility). In any event, appellant's claims do not eviscerate all of the forensic evidence. For example, appellant's claims do not eliminate the fact that consistent fibers were found on both his clothing and the victim's clothing and sheets or the fact that 99.99% of the population other than appellant and the victim were excluded as contributors to the mixture found in appellant's underwear.

CONCLUSION

Appellant's remaining issues are without merit and we dispose of them pursuant to Rule 220(b), SCACR. *See Issue I: State v. Council*, 335 S.C. 1, 515 S.E.2d 508, *cert. denied*, 528 U.S. 1050, 120 S.Ct. 588, 145 L.Ed.2d 489 (1999) (whether juror is qualified to serve on death penalty case is within discretion of trial court and is not reviewable on appeal unless wholly unsupported by the evidence; responses of challenged jurors must be examined in light of entire voir dire); *Issue IV: State v. Johnson*, 338 S.C. 114, 525 S.E.2d 519, *cert. denied*, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000) (appellate court will not disturb trial court's ruling concerning scope of cross-examination of a witness to test his or her credibility absent manifest abuse of discretion); *see also State v. Beckham*, 334 S.C. 302, 513 S.E.2d 606 (1999) (trial court erred by not admitting impeachment evidence after officer denied he had investigated two suspects different from the defendant; however, error found to be harmless); *Issue VI: State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1996), *cert. denied*, 520 U.S. 1268, 117 S.Ct. 2441, 138 L.Ed.2d 201 (1997) (contemporaneous objection required to preserve issue for appellate review); *Issues VII and VIII: State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999), *cert. denied*, 529 U.S. 1025, 120 S.Ct. 1434, 146 L.Ed.2d 323 (2000) (capital defendant may present as mitigating evidence (1) any aspect of defendant's character or record and (2) any circumstances of the crime that may serve as a basis for a sentence less than death); *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994), *cert. denied*, 513 U.S. 1166, 115 S.Ct. 1136, 130 L.Ed.2d 1096

(1995)[9] (residual doubts are not a mitigating factor in sentencing); *Issue IX: Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (properly administered the business and public records exceptions are among the safest against a Confrontation Clause challenge of the hearsay exceptions); Rule 1006, SCRE (contents of voluminous records may be presented in form of a summary provided underlying data are admissible into evidence); *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683, *cert. denied*, 519 U.S. 1045, 117 S.Ct. 618, 136 L.Ed.2d 541 (1996) (prison disciplinary records admissible under Uniform Business Records as Evidence Act, S.C.Code Ann. § 19-5-510 (1985)); *Issue XI: Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (victim impact evidence is admissible in a capital sentencing proceeding); *Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001), *cert. denied*, 537 U.S. 835, 123 S.Ct. 145, 154 L.Ed.2d 54 (2002) (no *ex post facto* violation in allowing victim impact evidence when crime occurred in 1984); *Issue XII: State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1996), *cert. denied*, 520 U.S. 1268, 117 S.Ct. 2441, 138 L.Ed.2d 201 (1997) (contemporaneous objection required to preserve issue for appellate review); *Issue XIII: State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984) (party cannot complain of error which his own conduct has induced); *Issue XV: State v. Weik*, 356 S.C. 76, 587 S.E.2d 683 (2002), *cert. denied*, 539 U.S. 930, 123 S.Ct. 2580, 156 L.Ed.2d 609 (2003) (issues cannot be raised for the first time on appeal); *State v. Saltz*,

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9. *Overruled on other grounds by State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995).

346 S.C. 114, 551 S.E.2d 240 (2001) (admission of evidence is in trial court's discretion and will not be disturbed on appeal absent an abuse of discretion).[10]

Proportionality Review

Under State law, S.C.Code Ann. § 16-3-25(C)(3) (1985) requires this Court to determine in a death case "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." There is no requirement the sentence be proportional to any particular case; however, death sentences have been imposed in similar cases. *See State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004); *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274, *cert. denied*, 531 U.S. 882, 121 S.Ct. 197, 148 L.Ed.2d 137 (2000); *State v. Council*, 335 S.C. 1, 515 S.E.2d 508, *cert. denied*, 528 U.S. 1050, 120 S.Ct. 588, 145 L.Ed.2d 489 (1999); *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683, *cert denied*, 519 U.S. 1045, 117 S.Ct. 618, 136 L.Ed.2d 541 (1996). Accordingly, appellant's sentence is not disproportionate under State law. The judgment of the circuit court is

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10. As for Issue XIV, appellant's argument is based upon a factual error. Appellant argues the trial court erred by permitting the State to cross-examine a social worker using records from his stay in Gilliam Psychiatric Hospital in 2000. However, the trial court in fact denied the State's request to cross-examine the social worker and the State did not ask any questions regarding the 2000 Gilliam records. Because the Record on Appeal does not support appellant's assertion, we do not address his argument. *See State v. Sinclair*, 275 S.C. 608, 274 S.E.2d 411 (1981) (where appellant obtained only relief he sought, this court has no issue to decide).

AFFIRMED.

TOAL, C.J., WALLER, J., and Acting Justice JOHN W. KITTREDGE, concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent, and would find the circuit court erred in refusing to allow appellant to introduce evidence of third party guilt in the guilt phase of the trial. I would therefore reverse and remand for a new trial.

The majority and I agree on the third party guilt evidence proffered by appellant. In my view, the proffer met the standard established by *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941). The majority, relying on *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001), concludes that the third party guilt evidence was properly excluded. I find *Gay* distinguishable.

In *Gay*, the Court affirmed the exclusion of evidence of third party guilt because the State's case, particularly the forensic evidence, was so strong that it admitted of no "reasonable inference" regarding the defendant's innocence. The present case is distinguishable from *Gay* in several important particulars. First, the validity of the forensic evidence was not called into question in *Gay*. Here, appellant presented evidence of mishandling, for example the collection of evidence at the scene using grocery bags from the victim's kitchen, the mislabeling of samples at the lab, and the loss of all blood samples collected from the victim. Further, appellant proffered evidence that representatives of

the State had admitted manufacturing blood and palm print evidence against him. Finally, unlike the defendant in *Gay*, appellant proffered both "proximity" witnesses and " confession" witnesses. Considering the record as a whole, the State's evidence was not sufficient to negate the "reasonable inference" of appellant's innocence arising from appellant's proffer.

I would reverse and remand for a new trial.

APPENDIX B — ORDER OF THE COURT OF GENERAL SESSIONS, SIXTEENTH JUDICIAL CIRCUIT DATED AUGUST 23, 2000

IN THE COURT OF GENERAL SESSIONS SIXTEENTH JUDICIAL CIRCUIT

#90-GS-46-1196, 1197, 1198, 1200

STATE OF SOUTH CAROLINA

COUNTY OF YORK

STATE OF SOUTH CAROLINA,

PLAINTIFF,

v.

BOBBY LEE HOLMES,

DEFENDANT.

ORDER
RE: THIRD PARTY GUILT EVIDENCE

Defendant seeks admission of evidence he claims tends to prove another guilty of the murder of Mary Stewart for which he is charged in the above set forth indictments. Defendant has presented on this issue testimony by a number of witnesses he claims bring this proffered evidence within the guidelines of the *State v. Gregory*, 198 S.C. 98, 16 S.E. 2d 532 (S. Ct. 1941).

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In *Gregory* our Supreme Court established the criteria for admission of third party guilt evidence. *Gregory* sets forth this rule as follows:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends to clearly point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty. (16 S.E.2d at 534)

The defendant's witnesses establish to the Court's satisfaction that sufficient evidence exists from which a jury may conclude a third party, Jimmy McCaw White was in the

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proximity of Mary Stewart's home near the time the State asserts she was beaten and raped. See testimony of Renata Jamison, Neshelly Gilmore and Delores Brown. (The Court finds Annie Boyd's testimony insufficient to place Jimmy McCaw White in the area at the time).

The defendant presented Joshua Lytle to rebut Jimmy McCaw White's testimony that he rode to Sharon with Lytle hours prior to the purported time of the beating and rape. The Court finds this evidence supports the testimony of the three "proximity" witnesses set forth above. Additional, it shows that Jimmy McCaw White's testimony is subject to impeachment on this issue (i.e. his being at home in Sharon at the time of the crime) if he were to be called as a witness at trial.

The defendant presented testimony by John Dixon and Nancy Bennett, which does not amount to a confession by Jimmy McCaw White as the party guilty of the murder of Mary Stewart. The testimony of Thomas Murray, Steven Westbrook, Mattie Mae Scott and Ken Rhodes do rise to the level of testimony from which one could conclude Jimmy McCaw White has admitted in the presence of these witnesses tht he beat and raped Mary Stewart.

Defendant presented a theory on motive for Jimmy McCaw White being the guilty party, that motive being his "fixation" with "other women". The testimony does not rise to the level to establish this as a propensity of Jimmy McCaw White with the possible exception of Ken Rodes' testimony, which marginally could be taken as evidence of a penchant for older women by Jimmy McCaw White.

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Jimmy McCaw White testified he did not commit the crime Defendant is charged with in the above set forth indictment.

At first blush, the above arguably rises to the *Gregory* standard. However, the "engine" that drives the train" in this *Gregory* analysis is the "confessions" by Jimmy McCaw White. Such "confessions" are, of course, hearsay. In order for Mr. Holmes to put the engine on the track, these hearsay "confessions" must be admissible as declarations against penal interest under rule 804(b)(3), South Carolina Rules of Evidence. Admissions under this Rule when offered to exculpate an accused, must be corroborated by evidence clearly indicating the trustworthiness of the statement. *State v. Kinloch*, 338 S.C. 385, 526 S.E. 2d 705 (Sup. Ct. 2000). *State v. Forney*, 321 S.C. 353, 468 S.E. 2d 641 (Sup. Ct. 1996) and *Stae v. Doctor*, 306 S.C. 527, 413 S.E. 2d 36 (Sup. Ct. 1992).

Here, Defendant bears a "formidable burden" in meeting the Rule's requirements (*Kinloch*, 526 S.E. 2d 706) and Defendant's presentation does not meet this burden. Thus the train's engine is not on track and the train cannot travel into and through this case. The evidence here presented pales in comparison to that excluded in *Forney*, and in *Forney* the declarant was in fact a co-defendant and Forney testified as to the witness being present at the shooting of Officer McCants and named his co-defendant as the triggerman (468 S.E. 2d at 644). The evidence presented by Defendant falls woefully short of that in *Doctor*. In *Doctor* all three minor defendents had related identical version of the crime and three witnesses saw the stolen car being occupied by the witnesses

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whose statements against penal interest were offered without Doctor in the car.

Here, as in Forney, there is no independent evidence corroborating Jimmy McCaw White's alleged statements that he committed the beating and rape of Mary Stewart. As the Supreme Court observed in reference to *Forney* in the Court's opinion, in *Kinloch*, for the statements to rise to the level of trustworthiness, there should be "independent evidence corroborating the *declarant's* claim" (Emphases added, 526 S.E. 2d at 707). Additionally, at the time of the alleged statement in the presence of Mattie Mae Scott, Jimmy McCaw White was, according to her, "intoxicated." (See *Kinloch* regarding statements by those under the influence of drugs).

None of the proffered testimony contains evidence, absent the statement itself, which would link Jimmy McCaw White to the crime other than information that from all the testimony appears to have been common knowledge, i.e. an "old women" had been beaten and raped in the early morning hours and that Defendant had been tried, convicted and sentenced to death for the crime. None of Jimmy McCaw White's staement contain details of the crime and no forensic evidence has been offered linking Jimmy McCaw White to the crime. White's alleged statements are general in nature and his presence in the general area during the time period in which the crime is alleged to have occurred, does not corroborate his alleged "confessions".

Exclusion of the alleged statements of Jimmy McCaw White, will leave not only the engine missing from the train, but results in there be absolutely no facts or circumstances

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which clearly point to Mr. White or anyone else as the person guilty of the beating and rape of Mary Stewart. This being the case, the *Gregory* analysis ends here and Defendant's motion to present evidence of Third Party Guilt is DENIED.[1]

IT IS SO ORDERED.

s/ John C. Hayes, III #5
John C. Hayes, III
Presiding Judge

August 23, 2000
York, South Carolina

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1. Defendant argues in his brief that Jimmy McCaw White's statements may be used to impeach his testimony. As to how Mr. White would even be on the stand in this trial is only by convolution addressed in Defendant's brief. Impeachment of any witnes will be a matter to be dealt with at trial. (Save the Court's prior rulings regarding Defendant's prior record). If Mr. White does have relevant testimony such as to be a witness at trial, the issue of impeachment is deferred to that time should it occur.

APPENDIX C — ORDER OF THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA DENYING PETITION FOR REHEARING DATED DECEMBER 1, 2004

December 1, 2004

Acting Deputy Chief Attorney Wanda P. Hagler
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: The State v. Holmes, Bobby Lee

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.
s/ James E. Moore J.
s/ John H. Waller, Jr. J.
Justice E. C. Burnett, III, not participating

I would grant rehearing.

s/Costa M. Pleicones J.

December 1, 2004."

The remittitur is today being fowarded to the lower court.

Very truly yours,
s/ [illegible]
CLERK

APPENDIX D — PRESERVATION OF CONSTITUTIONAL CHALLENGE BY PETITIONER TO STATE'S CLOSING ARGUMENT AT TRIAL COURT DATED MARCH 23, 2001

* * *

Mr. Pope:

I would ask that you take the evidence that you have. It's been a long week. I would ask that you go back, consider the evidence, as you told us that you would, and return a verdict that speaks the truth. And the truth of the matter is that Ms. Stewart was raped. She was burglarized. She was robbed and she was killed. It's some the most evil malice in his heart by this man right there.

I appreciate your attention and I ask you to render justice. Thank you.

THE COURT: All right. We will take a break before we move forward. This won't be a smoke break. It's just a refresher break.

(The following takes place outside the presence of the jury panel)

THE COURT: We will reconvene in about five minutes, or so.

MR. MACDOUGALL: Could I ask the court's indulgence?

Appendix D

THE COURT: All right. Let's stay -- we hadn't stopped yet. Everybody sit back down.

Let's don't sit back down.

MR. POPE: Ladies?

MR. MACDOUGALL: I would just like to confirm, Your Honor, the text of the court's instructions on lost and destroyed evidence and circumstantial evidence, so that they are not misstated in summary. May I do that now?

THE COURT: Yes, I do. And as to the lost, I am charging just the language that I believe counsel asked for, leaving out the word further; that is, there was a sentence' there on page 689 that started further. I'm going to leave out the word further and charge "when a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party."

MR. MACDOUGALL: All right. Thank you.

THE COURT: And as to the circumstantial evidence, I am going to charge down to the language the third line up from the bottom of the indented part. It says "evidence in this case," period, and that's where I'm going to stop. Picked up "after the weighing all the evidence," but stopping between the period -- the period before the word after.

And then I'm going to pick up under footnote 13, which is actually from another case I have got written up there, and instead of saying "the jury may not convict the defendant,"

I'm going to say "you may not convict the defendant," and then conclude.

MR. MACDOUGALL: All right., thank you Your Honor.

THE COURT: We'll take --

MR. NETTLES: Your Honor, briefly may I put two issues on the record?

I have been told by -- I didn't catch it. -My understanding is that Mr. Pope posed the question to the jury where is the other guy at one point during his closing. And if that's the case, I think that the third-party guilt information that has been fought for is extremely relevant.

In addition, I would point out that that is burden shifting, and I would ask the court for a mistrial.

* * *

Mr. Nettles:

And, Your Honor, furthermore, I would point out that one of the reasons that it was ruled that it couldn't come in was because it wasn't relevant. Well, he made it relevant. You know, one of the -- one of the cornerstones of the court's ruling was that this evidence is just not relevant. Well, now it is. And so -- and, you know, it's pretty easy for him to make it relevant.

I'll pose the question this way, Your Honor. If during the case, if the solicitor had elicited evidence that made it relevant, the court would have then allowed us to put it up. If he would have during cross or asked a series of questions that made it all of the sudden relevant, we would be bringing in, you know, three or four witnesses that we have got that Jimmy White confessed to doing it.

He made it relevant. He shifted the burden back on us and we are supposed to enjoy not having that burden. And he's done that, Your Honor.

I think that to go forward would be a violation of due process and the Fifth Amendment -- it would be a due process of the amendment -- due process violation, compulsory process violation right to present an adequate defense. It would be a fair trial violation, in that to, on the one hand, deny us the opportunity to put up evidence, and then to allow the State to pose questions that they know we can't answer. And all of that is given to us by State Constitution as well, Your Honor. Thank you very much.

* * *

The Court:

I am going to give, on my own, a curative instruction. It's very general. It might be covered by what I'll say anyway, but I am going to instruct the jury that "arguments of attorneys are not evidence. Any statement that was made by any counsel that is not supported by the evidence must be disregarded. You are restricting your deliberations to the evidence

presented in this trial. I will tell you," again -- or "I will tell you about the State's burden and the presumption of innocence inures to Mr. Holmes' benefit in my charge." I'm not going to tell them that at this time. I'm going to wait and tell them that when I do my charge.

* * *

MR. NETTLES: Your Honor, obviously we would respectfully object to the charge that the court has proposed. We would like to propose a charge to the jury.

* * *

THE COURT: Bring in the jury.

MR. NETTLES: Your Honor, am I correct that the curative instructions you plan on giving is what you are going to -- I apologize.

You're going to read it in the charge? And it's clear that we have objected to that. We asked for a mistrial of the jury instruction at the time and a motion of the case.

THE COURT: Yes, I think the record is clear on that.

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